Supreme Court, U.S.
FILED
JUL 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-187

*No.*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

---

DAVID J. EWEN,

*Petitioner,*

*v.*

STATE OF ILLINOIS,

*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS - SECOND JUDICIAL DISTRICT**

---

Phyllis J. Perko
Harlovic & Perko
116 W. Main Street
West Dundee, Illinois 60118
(708) 426-4555
Attorney for Petitioner

## I
## QUESTION PRESENTED

Does the Illinois statute that criminalizes child pornography, ILL. REV. STAT. 1987, ch. 38, par. 11-20.1 offend the federal constitutional Equal Protection Clause, U.S. CONST. amend. XIV, §1, because subsection (b)(3) of the statute exempts "education programs conducted by licensed physicians, psychologists or social workers" from application of the statute's purview? Must the Petitioner's conviction for possession of child pornography under the statute be vacated?

1. Is the Equal Protection Clause violated because the exemption that allows certain licensed professionals to use child pornography retains a market for the contraband materials, and therefore is not reasonably related to the ultimate statutory purpose of eradicating all markets for child pornography? This question does not appear to be resolved by prior decisions of this Court because it is not clear whether, in criminal cases, the rational basis test must focus upon the inherent fundamental statutory purpose or whether it may be met by reference to a governmental purpose that is independent of the statute.

2. Does the narrow exception of the Illinois statute cause insidious discrimination because it prevents the legitimate educational functions that might be pursued by individuals outside the scope of the statutorily designated professions? The concerns that underlie this question were considered at least indirectly in Osborne v. Ohio, _____ U.S. _____, 110 S.Ct. 1091, 109 L.Ed. 2d 90, 110-111 (1990), which involved a child pornography statute that included broad exceptions.

3. Does the statutory exception for educational programs conducted by certain licensed professionals discriminate against expressive conduct based on its content or viewpoint? This equal protection question was raised, but left undecided, in Riley v. National Federation of Blind, 487 U.S. _____, 101 L.Ed.2d 669, 692-693, 108 S.Ct. 2667 (1988), where a state statutory provision that required the licensing of professional fundraisers was invalidated on First Amendment grounds.

II

## TABLE OF CONTENTS


| | | PAGE |
|---|---|---|
| I. | Question Presented | 1-2 |
| II. | Table of Contents | 3 |
| III. | Table of Authorities | 4-6 |
| IV. | Citations of Report of Opinion Sought to be Reviewed | 7 |
| V. | Statement of Jurisdiction | 8 |
| VI. | Constitutional Provisions, Statutes | 9-14 |
| VII. | Statement of the Case | 15-18 |
| VIII. | Argument | 19-29 |
| IX. | Appendices | |

Appendix A . . . . . A-1
Appendix B . . . . . A-16
Appendix C . . . . . A-22
Appendix D . . . . . A-23

## TABLE OF AUTHORITIES

**Cases:**

PAGE

*Kadrmas v. Dickinson Public Schools,*
____ U.S. ____, 108 S.Ct. 2481,
101 L.Ed.2d 399 (1988) . . . . . 21

*Kucharek v. Hanaway,*
714 F.Supp. 1499 (E.D. Wis. 1989),
*rev'd*, 902 F.2d 513 (7th Cir. 1990) . . . . . 21

*Kucharek v. Hanaway,*
902 F.2d 513 (7th Cir. 1990) . . . . . 21, 23, 26

*Lakewood v. Plain Dealer,*
486 U.S. 750, 108 S.Ct. 2138,
100 L.Ed. 2d 771 (1988) . . . . . 26

*McGowan v. Maryland,*
366 U.S. 420, 81 S.Ct. 1101,
6 L.Ed.2d 393 (1961) . . . . . 21

*Osborne v. Ohio,* ____ U.S. ____,
110 S.Ct.1691, 109 L.Ed.2d 98 (1990)
. . . . . 20, 23, 26

*People v. Ewell,*
194 Ill.App.3d 404, 551 N.E.2d 426,
141 Ill.Dec. 433 (2d Dist. 1990) . . . . . 22

## TABLE OF AUTHORITIES
**(continued)**

---


PAGE

*People v. Geever,*
122 Ill.2d 313, 522 N.E.2d 1200,
119 Ill.Dec.341 (1988), *appeal dismissed,*
____ U.S. ____, 109 S.Ct. 299,
102 L.Ed. 2d 319 (1988) . . . . . 20

*Police Department V. Mosley,*
408 U.S. 92, 92 S.Ct. 2286,
33 L.Ed.2d 212 (1972) . . . . . 21

*Riley v. National Federation of Blind,*
487 U.S. ____, 108 S.Ct. 2667,
101 L.Ed.2d 669 (1998) . . . . . 27

*Stanley v. Georgia,*
394 U.S. 557, 89 S.Ct. 1243,
22 L.Ed.2d 542 (1969) . . . . . 20

*U.T. Inc. v. Brown,*
457 F.Supp. 163 (W.D. N.C. 1978) . . . . 21, 22


**Constitutional Provisions**


*U.S. CONST.* amend I . . . . . 9, 19, 26

*U.S. CONST.* amend XIV, §1 . . . . . 9, 19-29

## TABLE OF AUTHORITIES
**(continued)**

---

### STATUTES


PAGE

*West. Ann. Cal. Penal Code,* § 311.3(c) . . . . . 24

*Minn. Ann. Stat.,* Sec. 617.247 . . . . . 24

*Ohio Rev. Stat. Ann.,* § 2901.21 (B) . . . . . 24

*Vernon. Ann. Tex. Stat.,* Code of Crim. Proc. Art. 43.25 . . . . . 24

*Ill. Rev. Stat.* 1987, ch.38 par. 11-21.1 . . . . . 10-14, 19

## IV
## REPORTS

The decision herein sought to be reviewed is reported as People v. Ewen, 194 Ill. App. 3d 404, 551 N.E.2d 426, 141 Ill. Dec. 433 (2d Dist. 1990).

## V
## JURISDICTION

1. A writ of certiorari is sought by the petitioner pursuant to Rule 20 of the Supreme Court of the United States to review a decision of the Appellate Court of Illinois - Second Judicial District that was announced and filed on February 23, 1990. (Appendix A, infra)

2. The petitioner sought review of the decision of the Appellate Court of Illinois by a timely filed petition for leave to appeal to the Supreme Court of Illinois. That petition for leave to appeal was denied on June 1, 1990. (Appendix C, infra) This petition for writ of certiorari is filed within sixty days of that denial of further review by the state courts.

3. Jurisdiction is conferred on this Court by 28 U.S.C. 1257(a) because review is sought from a final judgment rendered by the highest state court in which a decision could be had in a case where the validity of a state penal statute proscribing child pornography was drawn into question on the ground that it was repugnant to the Constitution of the United States.

## VI
## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

---

### United States Constitution
### Amendment [I]

**Freedom of religion, speech and press; peaceful assemblage; petition of grievances**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### United States Constitution
### Amendment XIV.

**§1. Citizenship rights not to be abridged by states.**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Illinois Revised Statutes (1987),**
**Chapter 38, Section 11-20.1 Child Pornography**

**§11-20.1.** (a) A person commits the offense of child pornography who:

(1) films, videotapes, photographs, or otherwise depicts or portrays by means of any similar visual medium or reproduction any child whom he knows or reasonably should know to be under the age of 18 where such child is:

(i) actually or by simulation engaged in any act of sexual intercourse with any person or animal; or

(ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus, or sex organs of another person or animal; or which involves the mouth, anus or sex organs of the child and the sex organs of another person or animal; or

(iii) actually or by simulation engaged in any act of masturbation; or

(iv) actually or by simulation portrayed as being the object of or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal; or

(v) actually or by simulation engaged in any act of excretion or urination within a sexual context; or

(vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or

sadomasochistic abuse in any sexual context; or

(vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the genitals of the child or other person; or

(2) with the knowledge of the nature or content thereof, reproduces, disseminates, offers to disseminate, exhibits or possesses any film, videotape, photograph or other similar visual reproduction of any child whom the person knows or reasonably should know to be under the age of 18 engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection; or

(3) with knowledge of the subject matter or theme thereof, produces any stage play, live performance, film, videotape or other similar visual portrayal which includes a child whom the person knows or reasonably should know to be under the age of 18 engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection; or

(4) solicits any child whom he knows or reasonably should know to be under the age of 18 to appear in any stage play, live presentation, film, videotape, photograph or other similar visual reproduction in which the child is or will be depicted, actually or by simulation, in any act, pose, or setting described in subparagraphs (i) through (vii) of paragraph (1) of this subsection; or

(5) is a parent, legal guardian or other person having care or custody of a child whom the person knows or reasonably should know to be under the age

of 18 and who knowingly permits or arranges for such child to appear in any stage play, live performance, film, videotape, photograph or other similar visual presentation, portrayal or simulation of any act or activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection.

(b)(1) It shall be an affirmative defense to a charge of child pornography that the defendant reasonably believed, under all of the circumstances, that the child was 18 years of age or older but only where, prior to the act or acts giving rise to a prosecution under this Section, he took some affirmative action or made a bonafide inquiry designed to ascertain whether the child was 18 years of age or older and his reliance upon the information so obtained was clearly reasonable.

(2) It shall be an affirmative defense to a charge of child pornography that the defendant was employed by a public library or any library operated by an institution accredited by a generally recognized accrediting agency, at the time the act leading to the charge of child pornography took place and such act was committed during the course of employment.

(3) The charge of child pornography shall not apply to the performance of official duties by law enforcement or prosecuting officers, court personnel or attorneys, nor to bonafide treatment or professional eduction programs conducted by licensed physicians, psychologists or social workers.

(c) Violation of paragraph (1), (4) or (5) of subsection (a) is a class 1 felony with a mandatory minimum fine of $2,000 and a maximum fine of

$50,000. Violation of paragraph (3) of subsection (a) is a class 2 felony with a mandatory minimum fine of $1500 and a maximum fine of $25,000. Violation of paragraph (2) of subseotion (a) is a class 4 felony with a mandatory minimum fine of $1000 and a maximum fine of $25,000.

(d) If a person is convicted of a second or subsequent violation of this Section within 10 years of a prior conviction, the court shall order a presentence psychiatric examination of the person. The examiner shall report to the court whether treatment of the person is necessary.

(e) Any film, videotape, photograph or other similar visual reproduction which includes a child under the age of 18 engaged in any activity described in subparagraphs (i) through (vii) or paragraph 1 of subsection (a), and any material or equipment used or intended for use in photographing, filming, printing, producing, reproducing, manufacturing, projecting, exhibiting, or disseminating such material shall be seized and forfeited in the manner, method and procedure provided by Section 36-1 of this Code for the seizure and forfeiture of vessels, vehicles and aircraft.

(f)(1) A person who commits the offense of child pornography shall forfeit to the State of Illinois:

* * * *

(g) Definitions. For the purposes of this Section, the term:

(1) "Disseminate" means to sell, distribute,

exchange or transfer possession, whether with or without consideration;

(2) "Produce" means to direct, promote, advertise, publish, manufacture, issue, present or show;

(3) "Reproduce" means to make a duplication or copy. Amended by P.A. 84-1029, Subsect. 1, eff. Nov. 18, 1985; P.A. 84-1280, Subsect. 1, eff. August 15, 1986.

## VII
## STATEMENT OF THE CASE

The petitioner David Ewen was convicted after a bench trial in the State of Illinois of the criminal offense of (possession of) child pornography in violation of ILL. REV. STAT. 1987, ch. 38 par. 11-20.1 (a) (2). The indictment, in relevant part. charged that Ewen:

> . . . with knowledge of the nature and content thereof, did possess photographs of children whom he knew or reasonably should have known to be under the age of 18, who were depicted and portrayed in poses and postures involving lewd exhibitions of the genitals . . . (Record on Appeal, C 13)

The facts adduced at trial are described in the opinion of the Appellate Court of Illinois which is sought to be reviewed (Appendix A, infra). In summary, the evidence was that the pornographic magazines in question had been possessed by Mr. Ewen in his home, and were surrendered to police officers who had come to the residence to obtain Mr. Ewen's consent to a search. There was no issue raised or proof adduced regarding Mr. Ewen's purpose for possessing the materials. There was no allegation or evidence that Mr. Ewen was involved in any display, production, dissemination, or similar use of the materials.

The constitutionality of the Illinois statute was challenged throughout the state court proceedings on various grounds that included the federal Equal Protection claim advanced in this petition for writ of

certiorari as well as federal First Amendment and Due Process grounds. The issues were first raised by petitioner through a pre-trial motion designated a "Motion for Discharge" (Record on Appeal, C 21). That motion was supported by a document referred to as "Brief and Argument" that was submitted to the trial court. In relevant part, the argument was as follows:

> The statutory provision violates the equal protection clauses of the federal and state constitutions, U.S. CONST. Amend XIV; ILL. CONST. 1970 Art. 1, Sec. 2, in its creation of exemptions for certain groups of persons, Ill. Rev. Statutes 1985, Ch. 38, Par. 11-20.1 (b)(3). The classification scheme created by the statute is not reasonable, and thus must fail. See: People vs. McCabe, 49 Ill. 2d 388, 275 N.E. 2d 408 (1971).
>
> Subsection (b)(3) of the child pornography statute provides that the offense does not apply to "professional education programs conducted by licensed physicians, psychologists or social workers." In so doing, the legislature recognized that child pornography may have at least educational or scientific value. It unreasonably, however, limited the exercise of the scientific or educational function involving child pornography, to three professions, and further required that such professionals be licensed. Such classification does not advance a legitimate governmental purpose. Knowledge, research and education are not limited or confined to certain professions and certainly not limited to those who are licensed within a profession. It is possible that any

> educational function in the context of child pornography may be more productively fulfilled outside the statutory enumerated professions or by persons who although trained in such professions, are not licensed practitioners thereof.
>
> The statutory scheme thus offends equal protection standards. Its classifications are not reasonably related to a legitimate governmental purpose.
>
> (Supplemental Record On Appeal, p. 4)

The trial court heard oral arguments of counsel on the constitutional attack against the statute at a pre-trial hearing. The equal protection argument was addressed. (Record on appeal, page 27 et seq.) The trial court took the matter under advisement, and later issued a memorandum opinion that upheld the statute (Record on appeal, C 37; Appendix B, infra)

The petitioner pursued his equal protection claim under the Fourteenth Amendment of the United States Constitution on review of his conviction to the Appellate Court of Illinois. (Defendant's brief, pages 20-21). The issue was reached by the intermediate state court, and decided adversely to the petitioner (Opinion, Appendix A, infra)

The petitioner preserved the federal equal protection question in his attempt at further review in the Illinois Supreme Court (Petition For Leave To Appeal, page 17). In relevant part, he claimed:

> The statute recognizes that child pornography

may serve an educational purpose by creating an exemption from application of the statute for "professional education programs conducted by licensed physicians, psychologists or social workers." ILL. REV. STATS. 1989, ch. 38, par. 11-20.1 (b)(3). The exemption of those named groups of licensed professionals is irrational because educational functions can be pursued legitimately outside those professions. The Appellate Court opinion does not undermine this assertion. The defendant maintains that there can be no more invidious discrimination than the limitation of educational pursuit to persons licensed by the government. The Appellate Court's opinion (page 11) to the contrary must be deemed erroneous. U.S. CONST., amend. XIV, ILL. CONST. (1970), art. 1, sec. 2

## VIII
## ARGUMENT

The Illinois child pornography statue exempts from its proscription "professional education programs conducted by licensed physicians, psychologists or social workers." ILL. REV. STAT. 1987, ch. 38, par. 11-20.1 (b)(3). Because that exemption is unrelated to the legislative purpose, invidiously discriminatory, and not neutral to the content and viewpoint of expressive conduct, it offends the federal constitutional guarantee of equal protection of the laws, U.S. CONST. amend. XIV, §1. The Petitioner's conviction for possession of child pornography should be vacated.

This court should accept the instant case for review by certiorari because it presents the following important, but as yet unsettled, questions of federal law. First, is the Equal Protection Clause violated by a statute that includes an exemption that contravenes the fundamental statutory purpose? Second, does the statutory exemption from the child pornography proscription for educational programs conducted by licensed professionals constitute invidious discrimination? Third, does the exception discriminate against expressive conduct based on its content and viewpoint?

Before the decision by the Appellate Court of Illinois in the instant case, the Illinois Supreme Court in an unrelated case had upheld the constitutionality of the statute against the claim that the mere private possession of child pornography could not be criminalized because of the existence of the First Amendment right for the private possession of adult

obscenity recognized in Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). In People v. Geever, 122 Ill.2d 313, 522 N.E.2d 1200, 119 Ill. Dec. 341 (1988), *appeal dism'd,* ____ U.S. ____, 109 S.Ct. 299, 102 L.E.2d 319 (1988), the Illinois Supreme Court reasoned that the statutory ban against the mere possession of child pornography is permissible because "the individual's assurance of full freedom of conduct in the home must yield . . . to society's most compelling interest to protect its children from the lasting harm of emotional and sexual degradation." The Appellate Court of Illinois in the case at bar ruled that it was bound by the decision of the Illinois Supreme Court in Geever, People v. Ewen, 194 Ill. App. 3d 404, 551 N.E. 2d 426, 429, 141 Ill. Dec. 433 (2d Dist. 1990). Subsequent to these opinions of the Illinois courts, Osborne v. Ohio ____ U.S. ____, 110 S.Ct. 1691, 109 L.Ed. 2d 98 (1990), was decided by this Court. The Geever holding is consistent with that in Osborne, 109 L.Ed. 2d at 108.

It is thus clear that the State of Illinois, in conformity with the actions of other states, has sought to serve its legitimate interest in protecting children from exploitation through pornography by penalizing even the mere passive possessor or user of child pornography in order thereby to eradicate any market for child pornography. However, Illinois has chosen to exempt from the purview of its child pornography law certain users who are involved in education programs conducted by individuals who are licensed by the state within statutorily enumerated professions. That exemption raises several federal constitutional questions under the Equal Protection Clause that merit review by this Court.

### A. Rational Relationship Test

This Court has directed that the inquiry in all equal protection cases is "whether there is an appropriate governmental interest suitably furthered by the differential treatment." Police Department v. Mosley, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). The decisions of this Court have made it clear that the states are allowed considerable latitude in creating legislative classifications and distinctions, and that there is no precise basis for determining whether differential treatment bears a rational relationship to a legitimate state purpose. It has been explained that the Fourteenth Amendment is offended if a statutory classification "rests on grounds wholly irrelevant to the achievement of the state's objective." Kadrmas v. Dickinson Public Schools, ____ U.S. ____, 108 S.Ct. 2481, 101 L.Ed.2d 399, 412 (1988); McGowan v. Maryland, 366 U.S. 420, 424, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961).

The decisions of this Court clearly establish the requirement that legislative distinctions must be rationally related to a legitimate governmental purpose. However, they do not appear to determine definitively whether the Equal Protection Clause also requires that the governmental purpose sought to be served must be consistent with the fundamental goal of the statute, or whether the governmental purpose may rest on a justification totally independent of the statutory goal. Lower courts appear to be divided on the issue. Compare U.T. Inc. v. Brown, 457 F.Supp. 163, 165 (W.D.N.C. 1978) and Kucharek v. Hanaway, 902 F.2d 513, 520 (7th Cir. 1990), *rev'ing* 714 F.Supp. 1499, 1518 (E.D.Wis. 1989).

The fundamental goal of the Illinois child pornography statute is to protect children from exploitation by elimination of all markets for child pornography. The Appellate Court of Illinois in the case at bar judged the exception for educational programs conducted by licensed professionals without reference to that ultimate statutory purpose. The court merely concluded that, "the scheme which permits certain licensed health care professionals to use the material only for purposes sanctioned is certainly rational and not contrary to any public policy." People v. Ewen, supra, 551 N.E.2d at 431. Of course, although the exemption may serve the governmental purpose of entrusting licensed professionals with appropriate discretion, it manifestly does not serve the overall statutory purpose of eradicating all markets for child pornography. Rather, the exemption contravenes the statutory purpose by retaining a market for child pornography, albeit a market that is limited to "licensed physicians, psychologists [and] social workers."

The case of U.T. Inc. v. Brown, 457 F.Supp. 163 165 (W.D.N.C. 1978), is instructive. There, the court invalidated an ordinance prohibiting the commercial exploitation of obscenity as violative of the Equal Protection Clause because of its exception for certain licensed professionals. The court found that the "privileged use of obscenity by licensed professionals" had no relation to the basic goal of the ordinance. It reasoned that the use of obscenity for a bona fide educational purpose by a non-certified professional is no more commercially exploitive than the same use by a certified professional. The fact that the exception depended upon the profession or occupation of the person rather than merely upon the non-commercial

purpose was held to render the ordinance "pro tanto" inconsistent with the Equal Protection Clause.

This Court should decide that the Equal Protection Clause requires that classifications created by a penal statute must bear a rational relation to the fundamental statutory purpose rather than merely a rational relation to an independent governmental purpose. Under such a test, it is clear that the exemption for educational programs conducted by licensed professionals renders the Illinois child pornography statute unconstitutional. If the mere possession of child pornography creates a market that causes the exploitation of children, it does not matter that the possessor is a licensed professional. The statutory exception nevertheless contravenes the statutory purpose, and the classification, therefore, is irrational.

### B. Invidious Discrimination

It is invidiously discriminatory to allow the use of child pornography for educational purposes, but to limit the educational function to certain licensed professionals. Even if the Equal Protection Clause requires merely that a statutory exemption have some rational governmental purpose, rather than a rational relationship to the fundamental statutory purpose, equal protection of the laws demands that the discrimination created by the exemption must not be invidious. Kucharek v. Hanaway, supra, 902 F.2d 513 at 520.

This Court in Osborne v. Ohio, supra, 109 L.Ed 2d at 110-111, addressed the concerns that underlie the invidious discrimination claim in the case at bar.

Osborne contended that the Ohio statute was overbroad because it criminalized "an intolerable range of constitutionally protected conduct." Although Osborne's challenge was rejected because of the limiting construction that had been placed on the statute by the state court, this Court noted its scepticism of Osborne's argument "in light of the statute's exemptions and 'proper purposes' provisions."

In comparison to the narrow exemption of the Illinois statute which permits the use of child pornography only in "professional education programs conducted by licensed physicians, psychologists, or social workers," the Ohio statute permits a broader usage of child pornography for "proper purpose[s]" by persons having a "proper interest" OHIO REV. STAT. ANN. §2901. 21(B). Other states also include exemptions in their obscenity or pornography laws. At least one other state has a narrowly drawn exception for licensed professionals similar to the Illinois statute, MINN ANN. STAT. Sec. 617.247. However, it appears more common for the exceptions to be phrased in broader terms such as that found in the Ohio statute. For instance, in California, the pertinent portion of the exemption extends to "legitimate medical, scientific, or educational activities . . ." West. ANN. CAL. PENAL CODE §311.3(c). The Texas law does not apply to persons "having scientific, educational, governmental, or other similar justification." Vernon. ANN. TEX. STAT., Code of Criminal Procedure, Art. 43.25.

The narrow exemption of the Illinois statute that applies to educational programs of certain licensed professionals is a particularly invidious form of discrimination. The creation of the exemption

evidences a recognition by the State of Illinois that certain uses or forms of study of child pornography may have value to society. The state has offered no explanation of why such use or study for bona fide purposes should be limited to the statutorily enumerated professions of medicine, psychology or social work, and further limited to persons who hold state issued licenses within those professions.

It is entirely possible that persons engaged or employed in professions other than the ones listed in the statutory exemption might be engaged in legitimate study or research involving child pornography. For instance, educators, historians, artists, or persons interested in the justice system, among others, might investigate child pornography for the same or similar professional educational purposes as a physician, psychologist, or social worker. Likewise, students aspiring to admission in the statutorily enumerated professions, or retirees from those professions, might be expected to have the same interests, training and ability to analyze and educate respecting child pornography, even though they are not presently licensed in the professions.

It is extremely possible that non-exempted persons might be as directed as licensed professionals toward salutary purposes involving child pornography. They may be equally capable of, and inclined toward discovering the root causes for child pornography, examining its effects, and eliminating its harm.

The statutory restrictions of an educational function conducted by certain licensed professionals is irrational and invidiously discriminatory. It is inconsistent with

equal protection of the laws to afford access to a body of knowledge to certain persons based on a status that they hold through governmental licensing, and at the same time to deny such access to persons who would use the knowledge in a manner that was equally beneficial to society.

### C. Content And Viewpoint Discrimination

This court has not yet decided whether there is a "First Amendment interest in viewing and possessing child pornography." In Osborne v. Ohio, supra, 109 L.Ed.2d at 108, the existence of such a right was assumed "for the sake of argument." The case at bar does not necessarily entail resolution of the ultimate First Amendment question because the Illinois child pornography statute does not forbid all use of pornography. However, the case at bar does present the question of whether the statutory exception for licensed professionals is inconsistent with the Equal Protection Clause because it accords to certain persons the right to exercise a form of expressive conduct while denying that right to others. Lakewood v. Plain Dealer, 486 U.S. 750, 763-764, 108 S. Ct. 2138, 100 L.Ed. 2d 771 (1988); Kucharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990).

The statutory exemption affects "educational programs." Education involves communication, and is expressive conduct. Under the statute, the right to use child pornography and to educate about it is limited to licensed physicians, psychologists, and social workers. There can be no question but that the power of the

state to license speakers "carries with it . . . the power directly and substantially to affect the speech they utter." Riley v. National Federation of Blind, 487 U.S. ___, 108 S.Ct. 2667, 101 L.Ed.2d 669, 692 (1988). Further, a statute "permitting communication in a certain manner for some but not for others raises the specter of . content and viewpoint censorship." Lakewood v. Plain Dealer, 486 U.S. 750, 763, 108 S. Ct. 2138, 100 L.Ed.2d 771, 787 (1988).

The decisions in both Riley v. National Federation of Blind and Lakewood v. Plain Dealer involved this court's consideration of statutory licensing schemes that affected expressive conduct. In each case, the statute was invalidated on First Amendment grounds. In Riley, this Court struck down the licensing provision of a statute that applied to professional fundraisers. In so doing, it avoided the equal protection challenge made against the same provision. Thus, the precise question presented at bar was left open by the Riley decision.

The conclusion is inescapable that Illinois seeks to control the content and viewpoint of expressive conduct involving child pornography by limiting expression to certain licensed professionals. The statutory classification that exempts communication by individuals who are designated by named professions and controlled through the licensing power of the state implies a preference for the content and viewpoint of the ideas held and likely to be communicated by such individuals.

The statutorily exempted professions of medicine, psychology and social work are related to one another in their disciplinary orientation to the health of the

individual, whether physical, mental, or behavioral. It is likely that the state licensed members of those professions will have shared experience and opinions respecting child pornography that could differ dramatically from the experience and opinions of responsible persons in other fields, such as teachers, artists, historians, attorneys, law enforcement personnel, etc., as well as persons who are working toward licensure in one of the exempted professions or who have retired and surrendered the licenses they once held in the exempted professions.

Since Illinois has chosen to allow some expressive conduct involving child pornography, it may not censor that expression by discrimination based on its content and viewpoint. Because the Illinois child pornography seeks to do so, it runs afoul of the Equal Protection Clause.

## Conclusion

The Illinois child pornography statute is burdened with an exemption that creates classifications that raise serious and unsettled questions under the federal constitutional guaranty of equal protection of the laws. This Court should grant certiorari to review those questions, and ultimately to vacate the Petitioner's criminal conviction under the invalid state law.

Phyllis J. Perko
Harlovic & Perko
116 W. Main Street
West Dundee, Illinois 60118
(708) 426-4555
Attorney for Petitioner

**APPENDIX A**

Opinion of the Appellate Court of Illinois - Second Judicial District, filed on February 23, 1990, in The People of the State of Illinois v. David J. Ewen, No. 2-88-0894, which is sought to be reviewed by writ of certiorari.

No. 2-88-0894

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

| | |
|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | Appeal from the Circuit Court of McHenry County |
| Plaintiff-Appellee, | No. 87-CF-37 |
| v. | |
| DAVID J. EWEN, | Honorable Roland F. Herrmann, |
| Defendant-Appellant. | Judge, Presiding. |

PRESIDING JUSTICE UNVERZAGT delivered the opinion of the court:

Defendant, David J. Ewen, was indicted in the circuit court of McHenry County, for the offense of child pornography, in violation of section 11-20.1(a)(2) of the Criminal Code of 1961 (Ill. Rev. Stat. 1987, ch. 38, par. 11-20.1(a)(2)). Defendant was convicted of the

offense following a bench trial. He was sentenced to a term of probation for 12 months, a fine of $1,000, and 50 hours of public service work.

On appeal, defendant presents three issues: (1) is the child pornography provision unconstitutional; (2) should defendant's motions to suppress evidence and statements have been granted; and (3) was the proof of mental element sufficient beyond a reasonable doubt?

The statute under which defendant was convicted provides in part:

> "(a) A person commits the offense of child pornography who:
>
> ***
>
> (2) with the knowledge of the nature or content thereof, *** possesses any *** photograph or other similar visual reproduction of any child whom the person knows or reasonably should know to be under the age of 18 engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection." (Ill. Rev. Stat. 1987, ch. 38, par. 11-20.1(a)(2).)

Subparagraph (vii) provides as follows:

> "(vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the genitals of the child or other person ***." Ill. Rev. Stat. 1987, ch. 38, par. 11-20.1(a)(1)(vii).

The indictment charged that

> "the said defendant, with knowledge of the nature and content thereof, did possess photographs of

children whom he knew or reasonably should have known to be under the age of 18, who were depicted and portrayed in poses and postures involving lewd exhibitions of genitals of said children in violation of Illinois Revised Statutes 1987, chapter 38, paragraph 11-20.1(a)(2)."

In 1985, the statute we have set forth above made possession of child pornography an offense under the Criminal Code.

The defendant, a 43-year-old unmarried male, resides with his elderly mother in the family home where he has resided all of his life.

About 10 years before his arrest in this case, the defendant placed an ad in a Los Angeles, California, magazine giving his name and address, and the following:

"Wanted--Photos/slides of nude little girls, 6 to 15--bold, revealing poses. Also pre-teen sisters, brothers/sisters. Strong action or training poses. Samples please."

Thereafter, the Illinois Department of State Police was informed by the Los Angeles, California police department that the defendant had placed the advertisement described above. Sergeant James Turner of the Illinois State Police and a member of the Division of Criminal Investigation, Child Exploitation Unit, testified that he wrote an undercover letter to defendant on September 9, 1986, which asked for a meeting with the defendant. The letter, signed with a fictitious name, implied that the writer and Mr. Ewen

shared a common interest in collecting and taking photographs which required some discretion. The defendant did not respond to this letter.

On November 24, 1986, Sergeant Turner again wrote a letter to defendant using the fictitious name. This letter included an order form for photographs of boys and girls in sex action. The letter suggested that the writer and Mr. Ewen meet. Mr. Ewen took this letter to the Woodstock police department, asking that they take appropriate action. The Woodstock police department notified Sergeant Turner of their receipt of the letter from Mr. Ewen

Sergeant Turner and Detective Schultz met at the Woodstock police department, and they decided to go to Mr. Ewen's home to discuss the complaint he had about the letter that was sent to him in November.

Sergeant Turner, Detective Schultz, and special agent Melinda Pharis, also of the Illinois State Police, went to defendant's home. Defendant's mother met them at the door and ushered them into the foyer, where they met defendant who came up and asked them to come into the living room.

Sergeant Turner told Mr. Ewen that his name was on a police intelligence file of known child pornography subscribers. Turner showed Ewen a copy of the ad he had placed many years before in the Los Angeles publication. Turner told Ewen they wished to search the house because they believed that he was in possession of child pornography. Turner asked defendant for his signature on a permission-to-search waiver form. Ewen signed the form.

Defendant, Sergeant Turner, Detective Schultz and special agent Pharis went to the doorway of defendant's bedroom. Ewen went to a cabinet inside the bedroom, took out two parcels, handed them to Sergeant Turner, and said something to the effect: "This is what you are looking for."

The two parcels were manila envelopes. One was postmarked March 27, 1976, from Ontario, Canada, and contained two pamphlets titled Tuesday's Child and showing nude children. The other manila envelope was postmarked October 12, 1978, and was from the Netherlands. It contained advertising matter.

The women police agents searched the bedroom and found two more packages of material they believed to be child pornography. During this search Mr. Ewen conversed with Sergeant Turner and that culminated in his giving a written statement which was introduced as people's exhibit No. 2.

The police took the materials given to them by Mr. Ewen, the materials found by the policewomen, and Mr. Ewen's written statement and departed. Two weeks later defendant was arrested and charged with child pornography.

The defendant filed three pretrial motions. The first was a "motion for discharge" which alleged various constitutional defects in the statute defendant allegedly violated. The trial court denied this motion. The defense filed a motion to suppress evidence and a motion to suppress confessions. A hearing on these motions was held, and, thereafter, the trial court denied

the motions.

A bench trial was conducted by the trial court which found the defendant guilty of child pornography and sentenced defendant as heretofore outlined. Post-trial motions were filed and denied, and this appeal followed.

Defendant's initial contention is that the statutory prohibition against possession of child pornography found in section 11-20.1 of the Criminal Code of 1961 (the statute) (Ill. Rev. Stat. 1987, ch. 38, par. 11-20.1) is unconstitutional as a violation of his right to privacy. He, however, acknowledges that stare decisis binds this court to reject his argument on this issue by reason of our supreme court's decision in People v. Geever (1988), 122 Ill. 2d 313. Geever is dispositive of this issue, and we are bound to follow the decision therein. We must, therefore, reject defendant's argument based on the dissent filed in that case.

The defendant also challenges the constitutionality of the statute on the ground that the statute is overly broad in violation of the United States and Illinois Constitutions, (U.S. Const. amends. I, XIV; Illinois Const., 1970, art. I, §§4, 6).

This overbreadth, the defendant asserts, exists because of the statute's failure to exclude nonobscene portrayals from its scope. The defendant cites our supreme court's opinion in People ex rel. Difanis v. Barr (1980), 83 Ill. 2d 191, 209, where the court stated:

> "A governmental purpose to control or prevent activities constitutionally subject to State regulation

may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

The defendant argues that the statute subjects to prosecution any person who "films, videotapes, photographs or otherwise depicts or portrays by means of any similar visual medium or reproduction of any child," and then the statute enumerates various sexual acts. (Ill. Rev. Stat. 1987, ch. 38, par. 11-20.1(a)(1).) The defendant points out that the statute does not require that those acts be obscene in accordance with the established tripartite determination of obscenity. Ill. Rev. Stat. 1987, ch. 38, par. 11-20(b).

In New York v. Ferber (1982), 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348, the United States Supreme Court was called upon to determine the constitutionality of a New York criminal statute which prohibited persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances. In that case the United States Court of Appeals proceeded on the assumption that the standard of obscenity incorporated in the New York statute, which followed the guidelines of Miller v. California (1973), 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607, constituted the appropriate line dividing protected from unprotected expression by which to measure a regulation directed at child pornography. It was on the premise that "non obscene adolescent sex" could not be singled out for special treatment that the United States Court of Appeals held that statute invalid. On appeal, the United States Supreme Court reversed the Court of Appeals. It held that the nature of the harm to be

combated requires that the State offense be limited to works that visually depict sexual conduct by children below a specified age. it held that the category of "sexual conduct" proscribed must also be suitably limited and described. It held that the test for child pornography is separate from the standard enunciated in Miller. Ferber, 458 U.S. at 764, 73 L. Ed. 2d at 1127, 102 S. Ct. at 3358.

In Ferber the defendant also contended that the statute was overly broad because it would forbid the distribution of material with serious literary, scientific, or educational value or material which does not threaten the harms sought to be combated by the State. The United States Supreme Court rejected this view. It held that the State's special and compelling interest in protecting children who are especially vulnerable affords the State the leeway necessary to prohibit the activity specified by the statute. The Supreme Court pointed out that it has never held a statute invalid on its face merely because it is possible to conceive of a single impermissible application. 458 U.S. at 772, 73 L. Ed. 2d at 1132, 102 S. Ct. at 3362.

Under these principles the defendant's challenge to the scope of this statute fails. The statute is not overly broad because it does not require that the child pornography prohibited be obscene. The defendant also argues that the statute is overly broad because it does not "limit its purview to living or even actual children." The defendant argues that where a depiction is merely a fictitious likeness of a child, there is no child to protect. The defendant further argues that the State has no legitimate interest in protecting actual children who are artistically depicted in a nonobscene sexual

manner.

As to the former argument, the trial judge gave a limiting instruction which set forth that "any child" must be construed to mean any real child. Therefore, the overbreadth challenge fails on this issue. As to the latter argument, we are not convinced that the defendant has met his burden to show that the statute is unconstitutional with evidence that children will not be harmed by dissemination of themselves in sexual contexts described in section 11-20.1 merely because the material is deemed "artistic."

The defendant next contends that the statute in question violates the due process clause of the Federal and State constitutions. (U.S. Const., amends. V, XIV, Ill. Const., 1970, art. 1, §2.) He points out that a statute violates due process if it is not reasonably designed to remedy an evil legitimately identified by the legislature. (People v. Wagner (1982), 89 Ill. 2d 308.) He asserts that the statute at issue here applies to nonobscene sexual materials involving children "under the age of 18." (Ill. Rev. Stat. 1987, ch. 38, pars. 11.20-1(a)(1) through (a)(5).) He points out that the purported purpose of the statute is "society's "most compelling" interest to protect its children from the lasting harm of emotional and sexual degradation," but that applying the statute to all individuals under the age of 18 is not reasonably related to a legitimate State purpose because some persons under 18 are not necessarily children in need of protection.

Defendant in this context points out a person may marry at 16, is treated as an adult at 17 for purposes of criminal prosecution, may be convicted of a crime as

young as 13, and may be emancipated before the age of 18. He then argues that because of the above there is no legitimate governmental purpose in trying to protect these people.

We reject defendant's argument. It is of no consequence that the State treats children at different ages differently for certain legal purposes. The disparity of ages does not demonstrate that the legislative action is irrational. The State has a special interest in protecting the well being of its youth. (Globe Newspaper Co. v. Superior Court (1982), 457 U.S. 596, 607, 73 L. Ed. 2d 248, 257, 102 S. Ct. 2613, 2620.) This special and compelling interest, and the particular vulnerability of children, afford the State leeway to regulate pornographic material, the promotion of which is harmful to children.

The defendant next contends that the statutory provision violates the equal protection clauses of the Federal and State constitutions. (U.S. CONST., amend XIV; ILL. CONST., 1970, art. I, §2 in its creation of exemptions for certain groups of persons; Ill. Rev. Stat. 1987, ch. 38, par. 11-20.1(b)(3).) He asserts that the classification scheme is not reasonable and must fail.

The defendant points out that the statutory section to which he refers exempts from its reach "professional eduction programs conducted by licensed physicians, psychologists or social workers." This exemption, he argues, shows that child pornography may have at least some educational or scientific value, and it is unreasonable, he asserts, to limit the exercise of the scientific or educational function of child pornography to members of the three listed professions. In so doing,

he asserts, it discriminates against individuals outside those professions who may wish to undertake a serious study of child pornography.

The determination of whether a given legislative classification denies persons the equal protection of the law is an extremely sensitive area of judicial review. But, where a person is not a member of the suspect class or has not been deprived of a fundamental right, the court's role is simply to determine if the particular legislative classification is rationally designed to further a legitimate purpose. People ex rel. Tucker v. Kotsos (1977), 68 Ill. 2d 88, 96.

As the court pointed out in People v. Perine (1980), 82 Ill. App. 3d 610, 615, "[t]he equal protection clause does not mean that a State may not draw lines that treat one class of individuals or entities different from one other; the test is whether the difference in treatment is an invidious discrimination."

There is a presumption in favor of the validity of the classification made by the legislative body and one who assails it has the burden of proving the classification to be arbitrary. Jacobs v. City of Chicago (1973), 53 Ill. 2d 421.

We are of the opinion that the defendant has failed to establish that the legislative classification is irrational, or that any discrimination is invidious. The scheme which permits certain licensed health care professionals to use the material only for purposes sanctioned is certainly rational and not contrary to any public policy. We do not believe that the defendant has proved any invidious discrimination since he cannot show he is

licensed in one of the fields exempted.

The defendant next contends that the motions to suppress should have been granted. First, he argues that the police entry into defendant's home through use of a ruse rendered his consent to search involuntary. Here the police told him that they were investigating his complaint arising out of the letter to him which had, in fact, been initiated by the police.

We reject this argument because it is clear the officers were admitted to the house by the defendant's mother and not by the defendant. They merely told the mother that they wished to talk to "Dave." We reject defendant's argument that the circumstances surrounding the consents in this case were implicitly coercive.

The defendant argues that a warrant should have been obtained before the contents of the envelopes were examined. Two groups of materials tendered to the police by defendant were contained in envelopes. The defendant, citing Walter v. United States (1980), 447 U.S. 649, 65 L. Ed. 2d 410, 100 S. Ct. 2395, argues that a warrant should have been obtained before the police examined the contents of the envelopes.

We do not read Walter as broadly as the defendant. The Walter case involved obscene materials which were misdelivered to the wrong party, who turned them over to the police. Walter is distinguishable in that that case involved a private search, while the case at hand involves a consensual search. As pointed out in the Walter case, a search cannot exceed the scope of the authorization. In handing over the envelopes the

defendant consented to the search of them.

The defendant next contends that the oral and written statements taken from the defendant were tainted by the prior illegal search and seizure and, as such, must be suppressed. Brown v. Illinois (1975), 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254.

We reject defendant's argument here because we have determined that the search was conducted pursuant to defendant's voluntary consent.

Next, the defendant contends that the evidence taken from the defendant's home should be suppressed because the police engaged in outrageous conduct, citing People v. Kaludis (1986), 146 Ill. App. 3d 888, and People ex rel. Difanis v. Boston (1981), 92 Ill. App. 3d 962.

Defendant argues that the police conducted a type of "sting" operation "which is so outrageous that due process principles absolutely bar the government from invoking the judicial process to obtain conviction." United States v. Russell (1973), 411 U.S. 423, 36 L. Ed. 2d 366, 93 S. Ct. 1637.

Initially, we are of the opinion the police conduct herein was not "outrageous" as that term is used in the cases. People ex re. Difanis v. Boston (1981), 92 Ill. App. 3d 962.

In People v. Kaludis (1986), 146 Ill. App. 3d 888, the court pointed out that "[t]he basis of a claim that a law-enforcement agent's conduct with respect to the defendant was so outrageous that it violated due

process is that the conduct complained of must somehow, at the very least, assist the defendant in committing the crime and, thus, entrap him." 146 Ill. App. 3d at 897.

The police conduct here did not aid the defendant in committing the crime of child pornography. We, therefore, reject this argument.

Lastly, the defendant contends that he was not proved guilty beyond a reasonable doubt. The thrust of this argument is that defendant did not possess the requisite mental state to commit the offense of child pornography. He does not deny that on January 6, 1987, he had such materials under his control. He alleges, however, that the offending materials were obtained between 1976 and 1978 and he did not obtain any such materials after that date. He points out the statute did not take effect until 1985. He argues that it is entirely possible that before the effective date of the statute he forgot he possessed the material and, thus, lacked the requisite mental state to commit the offense.

We think the defendant demonstrated his knowledge of the nature of the offending materials when he produced them in response to the police inquiries. There is no evidentiary basis to conclude that defendant "forgot" about them. We are of the opinion that the defendant was proved guilty beyond a reasonable doubt.

The judgment and sentence of the circuit court of McHenry County are affirmed.

Affirmed.
DUNN and REINHARD, JJ., concur.

## *United States of America*

***State of Illinois,***
***Appellate Court,***
***Second District,***

*I, LOREN J. STROTZ, Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the decision of the said Appellate Court in the above entitled cause of record in my said office.*

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State,

this 23 day of
February A.D. 19 90 .

/s/ Loren J. Strotz
Clerk Appellate Court,
Second District

## APPENDIX B

Memorandum opinion of the trial court, the Circuit Court for the Nineteenth Judicial Circuit - McHenry County, Illinois, in People of the State of Illinois v. David Ewen, No. 87 CF 37, filed June 25, 1987, regarding the issue of constitutionality of the statute.

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

THE PEOPLE OF THE
STATE OF ILLINOIS,

Plaintiff.

vs. No. 87-CF-37

DAVID J. EWEN

Defendant.

MEMORANDUM OPINION

David Ewen has been indicted for the offense of child pornography. (ILL. REV. STAT. Ch. 38, Sec. 11-20.1 (a) (vii) (1985)). A Motion for Discharge has been filed by the defendant asserting a violation of Freedom of Speech and Press, the Right of Privacy, and Equal Protection of the laws, all guaranteed by the U.S. Constitution.

Obscenity is not protected by the First Amendment. "[I]plicit [sic] in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." Roth v. United States, 354 U.S. 476, 484 (1957). However, the statute in issue does not require that the material be obscene. "[S]ex and obscenity are not synonymous... The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of Freedom of Speech and Press." Roth v. United States, 354, U.S. 476, 487 (1957). This statute's predecessor (ILL. REV. STAT. Ch. 38, Sec. 11-20 (a) (1983)) incorporated in its statutory scheme the definition of obscenity as set forth in Miller v. California, 413 U.S. 15 (1973). Thus, under the statute, in order to be classified as child pornography, the material had to be found obscene. People v. Spargo, 103 Ill. App. 3d 280, 286, 431 N.E.2d 27, 31 (1982). That statute was repealed and the new statute adopted in its stead omits the element of obscenity (P.A. 83-472). No longer is it material whether or not lewd portrayals of children, "taken as a whole, ... have serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). Because the statute does not equate pornography with obscenity, the state must show a governmental interest more important than the right of free expression. "All ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests...." Roth, 354 U.S. at 484.

The State asserts here, and rightly so, "that a State's interest in 'safeguarding the physical and psychological well-being of a minor is 'compelling'" and that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Ferber, 458 U.S. at 757. That this statute includes within its ambit all those under 18 years of age only negligibly impacts upon this degree of importance. Indeed, while this precise issue was not before the Court in Ferber, that Court noted that sixteen states utilized the very classification scheme in combatting child pornography as that used here. Ferber, 458 U.S. at 764 n. 17.

Ferber concluded that a child pornography statute not too dissimilar as that in issue here did not violate the First Amendment. Ferber, 458 U.S. at 764. The Supreme Court reached that conclusion after finding that the "evil to be restricted so overwhelmingly outweigh[ed] the expressive interests, if any, at stake..." Id. at 763-64. In that case, as in this, the important governmental interest was the "welfare of children engaged in [production of child pornography]" Id. at 764. That same interest compels this Court to uphold this state's limited infringement upon the defendant's freedom of expression.

The crux of the defendant's overbreadth challenge, however, rests upon the assumption that there may be material described in 11-20.1 yet is of redeeming social importance and does not involve live performances by children for their production. As Ferber noted, "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which [does] not involve live performance or photographic or other visual

reproduction of live performances, retains First Amendment protection." 458 U.S. at 764-65. It is not contended that this is the type of material with which the defendant is charged as having possessed. Nevertheless, in the First Amendment area,

> [litigants] are permitted to challenge a statute not because their own rights of free expression are violated, but because of judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.

Broaderick v. Oklahoma, 413 U.S. 601, 612-13 (1973).

This Court is in agreement with the defendant that this statute "may reasonably be interpreted to prohibit conduct which is constitutionally protected." People ex rel. Difanis v. Barr, 83 Ill. 2d 191, 209, 414 N.E. 2d 731, 739 (1980). In this regard, the statute is unconstitutionally overbroad. However, a saving construction in this case will not entail "'perverting the purpose of a statute' or judicially rewriting it." Nor would a saving construction require a case-by-case adjudication of its scope and application. Id. at 516. This controversy requires simply an interpretation of the word "child;" whether depicting or portraying "any child" means any real child or any child whatsoever -- real or

imaginary. To be constitutional, "any child" must be construed to mean any real child. In addition to the mandate assumption that the State intended this statute to be constitutional (People v. Stevens, 92 Ill. App. 3d 794, 416 N.E. 2d 314 (1981)), the obvious purpose of this statute is protecting real children. This Court will attempt to carry out that purpose and, in so doing, uphold the legislative enactment.

## RIGHT OF PRIVACY

In Stanley v. Georgia, 394 U.S. 557 (1969), the Supreme Court held that the State's interest in the protection of "the individual's mind from the effects of obscenity" (Id. at 565) and whatever other reasons justify regulating obscenity, (Id.) did not justify infringing upon the right of privacy which at least prohibits "making mere private possession of obscene material a crime." Id. at 568. Unlike Stanley, the State interest here is the protection of children from sexual exploitation.

As noted above, this is a compelling State interest which, like the infringement upon the exercise of free speech and press, justifies infringement upon the exercise of the right of privacy. Like the above, this infringement is subject to the same proviso in that the statute must include only real children. In as much as this court reads the statute in that manner, the defendant's right of privacy is not violated.

## EQUAL PROTECTION

The equal protection claim asserted by plaintiff is without merit. Not encompassing within the statute's

reach those who may come into possession of the regulated material for the limited purpose of prosecuting pedophiles and administering therapy to the victims is, in this Court's view, rationally related to a legitimate state interest.

The defendant's motion for discharge is denied. Counsel for plaintiff shall prepare an order consistent with this opinion and present it to the court upon proper notice to defendant.

ENTER:

/s/
ROLAND A. HERRMANN
Circuit Judge

Date: /s/ June 25, 19 87

cc: Thomas F. Baker
State's Attorney

James Boback
BOBACK BIANCHI & SIMKO, LTD.
15 W. Crystal Lake Ave.
Crystal Lake, IL 60014

## APPENDIX C

Order of the Supreme Court of the State of Illinois in People of the State of Illinois v. David J. Ewen, No. 70018, issued on June 1, 1990, which denied review sought by petition for leave to appeal from the judgment of the Appellate Court of Illinois - Second Judicial District.

70018

**ILLINOIS SUPREME COURT**
**JULEANN HORNYAK, CLERK**
**SUPREME COURT BUILDING**
**SPRINGFIELD, ILL. 62706**
**(217) 782-2035**

June 1, 1990

Ms. Phyllis J. Perko
Harlovic & Perko
116 W. Main St.
West Dundee, IL 601118

No. 70018 -People State of Illinois, respondent, v. David J. Ewen, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 25, 1990.

## APPENDIX D

Order of the Appellate Court of Illinois - Second Judicial District in People v. David J. Ewen, No. 2-88-0894, entered on July 3, 1990, staying issuance of its mandate pending review by the Supreme Court of the United States.

STATE OF ILLINOIS APPELLATE COURT OF SECOND DISTRICT

OFFICE OF THE CLERK
312/695-3750

APPELLATE COURT BUILDING
ELGIN, ILLINOIS
60120-5558

Appeal from the Circuit Court of County of McHenry

Trial Court Number: 87CF37

THE COURT HAS THIS DAY, 07/03/90, ENTERED THE FOLLOWING ORDER IN THE CASE OF:
Gen. No.: 2-88-0894

People v. Ewen, David J.

The motion by Appellant, David J. Ewen, moving this Court to stay issuance of its mandate is allowed.

LOREN J. STROTZ, Clerk

cc: Harlovic & Perko
Phyllis J. Perko
Boback, Bianchi & Simko, Ltd.
James M. Boback
Honorable Thomas F. Baker
William L. Browers, Deputy Director